NEHRU, NON-JUDICIAL REVIEW, & CONSTITUTIONAL SUPREMACY

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ABSTRACT

The making of a Constitution is typically seen as coinciding with the transfer of power from the constitution-making body to the courts. Matters unfolded differently after the founding of the Indian Constitution. Even as courts engaged in judicial review to interpret the Constitution and strike down offending legislation, Parliament engaged in 'non-judicial review'. Under the leadership of Prime Minister Nehru, it offered alternative interpretations of the Constitution, regularly amended it, and revived legislation that had been struck down by the courts. On the one hand, non-judicial review was based on the Nehruvian conception of what Parliament's role entailed. It was the task of the democratically elected Parliament, rather than the Courts, to protect those rights that had been so zealously fought for during the freedom movement. On the other hand, however, non-judicial review was conceived of as instrumental to constitutional democracy itself- for the Constitution's legitimacy rested upon its ability to fulfill Nehru's promises of 'political democracy' combined with 'economic democracy'.

I. INTRODUCTION

On the 24th of January 1950, the Constituent Assembly of India convened for the last time. Amidst much fanfare, the Constitution was signed, the national anthem sung, and the Assembly adjourned 'sine die'. In the words of Jawaharlal Nehru, a chapter had indeed closed.[1] Yet, as is often the case, the conclusion of one chapter was closely followed by the inauguration of another. After the Assembly had labored for over three years in the backdrop of 'turmoil and crisis',[2] the time had now come to operationalize amongst the most heroic constitutional experiments in modern history.

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[1] Constituent Assembly Debates, Volume XII, 24 January 1950 (Jawaharlal Nehru).

[2] Constituent Assembly Debates, Volume XII, 24 January 1950 (Jawaharlal Nehru).

Transitions from 'constitutional politics' to 'ordinary politics' (Ackerman 1991) are often marked by a transfer of power from the constitution-making body to the constitutional courts. After the scope of rights and freedoms is defined by the constitution-making body in general terms, it becomes the job of the courts to decide what those rights signify in specific contexts, how to vindicate them, and when ordinary legislation must fall in the face of contrary constitutional commands. As Hirschl explains, there is a 'deliberate transfer of foundational nation-building questions to the judiciary' (Hirschl 2004: 186).

The early constitutional experience in India reflected a quite different narrative. Soon after the Constitution entered into force, the Supreme Court and High Courts began interpreting the text, relying on those interpretations to strike down legislation and executive policy that fell out of scope. These early forays into constitutional judicial review, however, were matched by parliamentary engagements in 'non-judicial review'. Under the leadership of Prime Minister Nehru, Parliament offered alternative interpretations of the Constitution, regularly amended it, and revived legislation that had been struck down by the Courts.

At one level, non-judicial review was based on Parliament's conviction that it could interpret the Constitution better than the courts. Many influential members of India's early parliaments were not just lawyers, but also former members of the Constituent Assembly that deliberated upon, and approved, the text. Non-judicial review was based on the Nehruvian conception of what Parliament's role entailed. It was the primary responsibility of the democratically elected Parliament, rather than the Courts, to protect those rights that had been so zealously fought for during the freedom movement.

At another level, however, non-judicial review was conceived of as instrumental to constitutional democracy itself. The Constitution's legitimacy rested upon its ability to fulfill the promises of 'political democracy' combined with 'economic democracy' that Nehru had so often emphasized upon. These promises prompted Parliament to offer conceptions of rights that were alternative to those of the courts; amend the Constitution based on those conceptions; and protect legislation that was enacted to transform the existing social order.

II. NON-JUDICIAL REVIEW & THE MAKING OF THE CONSTITUTION

In this paper, borrowing from Mark Tushnet (Tushnet, 2003), I will use the phrase "non-judicial review", in contrast with judicial review, as the process of elected officials, who are subjected to oversight by the

media and civil society, interpreting the Constitution and examining legislation against constitutional or rights-based parameters. Although negatively framed, the phrase non-judicial review will not include constitutional interpretation by all state actors apart from courts (such as government officials and bureaucrats) on rights-based parameters. Instead, I will focus on review by members of the Lok Sabha alone during Nehru's tenure as Prime Minster. Non-judicial review offers the opportunity of a more democratically grounded forum for the consideration of rights issues. Democratic justifications for judicial review tend to be indirect (Waldron 2006: 1391) – for example, that elected representatives have a role in the process of appointment of judges, that judicial review reinforces representational principles embodied by the constitution (Ely, 1978), or that judicial review is a participatory form of decision-making, since judges decide rights-based questions based on societal value judgments (Harel, 2003).

In contrast, elected MPs enjoy democratic credentials which rest on much surer footing. MPs also benefit from another major advantage when testing legislation on rights-based grounds. Rather than involving themselves with the intricacies of precedent and technical rules, they can think more broadly about the nature of the rights at stake. For example, when deciding whether compulsory polygraph tests violated suspects' right against self-incrimination, courts would need to consider past precedent on the right against self-crimination, the history of the right, and previous interpretations of the words used to articulate that right.[3] MPs are not inhibited by such factors, and can engage in unconstrained moral deliberations about the rights in play (Gardbaum 2013: 81-2; Hiebert 2005: 239). As Jeremy Waldron observes, "words of each provision in the Bill of Rights tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question" (Waldron 1999: 220). As we shall see, this is an issue that arose frequently during the debates on the early constitutional amendments in India. Whereas courts read constitutional language based on established interpretive methods, MPs contended that the courts' legalistic interpretations betrayed the genuine intentions of the Constituent Assembly.

In many ways, the socio-political context in which the Constitution was enacted established fertile ground for non-judicial review in the early years of India's democratic experiment. Initially, Nehru saw it as important for the Constituent Assembly that was convened to frame the Constitution to draw "its strength

[3] This example is adapted from the Indian Supreme Court's judgment in Selvi v. State of Karnataka, (2010) 4 SCALE 690.

and inspiration from the masses" (Nehru 1989: 574). But soon enough, popular election of a Constituent Assembly was not conceived of as a realistic option, given the "wholly unacceptable" delays that it would cause. The Cabinet Mission Plan of 1946 therefore suggested relying on the elected provincial legislative assemblies - themselves chosen by an electorate constrained by several "tax, property and educational requirements" (Lerner 2011: 113-4) - as the electing body for the Constituent Assembly. The method chosen for elections was a "system of communal representation tempered by proportional representation" (Panigrahi 2004: 279). Although the Assembly represented a broad spectrum of parties and ideologies, more than four-fifths of its members belonged to the Congress Party (Guha 2008: 116).

Just as a majority of the electorate did not get the opportunity to choose the members of its Constituent Assembly, so also it equally lacked the power to directly reject (or, for that matter, accept) the Constitution drafted by that Assembly. The Congress Party, energized by charismatic leaders such as Gandhi, Nehru, and Patel, undoubtedly enjoyed broad-based popular support amongst the masses (Ackerman 2017). Nevertheless, the façade of popular acceptance that generally accompanies referendum processes – a façade that nonetheless counts for something and helps 'attain general acquiescence to the constitutional regime' (Barnett 2003: 126) - was missing. So although the Constitution was solemnized in the name of "We the People of India", a vast majority of the people had no direct role to play in the actual process of framing the Constitution (De, 2010).

The absence of popular participation in the Constitution-making process – and equally, the widespread participation of people in the freedom movement – signified that the popular support for the Constitution would depend upon its ability to fulfill the promises made to the people. At the least, the people in whose name the Constitution was solemnized would need to see that the nation was moving in the direction of social equality and egalitarianism, as the framers of the Constitution had promised. As much as the struggle against the British Raj had succeeded, far more significant battles were still to be waged within the country. As Beteille explains, democracy emerged in India out of a confrontation with externally imposed power "rather than an engagement with the contradictions inherent in Indian society" (Beteille 2012: 9). The Constitution's task was to dislodge these deeply entrenched internal contradictions. Framing the document was indeed just the first step in a "journey of a thousand miles" (Baxi 1967: 330).

By all conventional yardsticks, the Indian sub-continent was ripe ground for democratic disaster. This was a multi-religious, multi-ethnic, multi-lingual state, with a highly stratified society. In many ways, the

Constitution was nothing short of an audacious experiment that was bound to fail - universal adult franchise, federalism in a nation consisting of over 550 princely states, and social revolution in a deeply unequal society. The departure of the British also meant that no one else was left to fault if things went wrong. As Dr. Ambedkar observed: "[b]y independence, we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves".[4]

The promises set forth in the Constitution ensured that the text itself set the standards for its legitimacy. Many constitutions attempt the task of entrenching a political compromise between the incumbents and challengers of the day. The Indian Constitution was different. It expressed a sense of unease with the status quo and raised expectations of root-and-branch social revolution. The fact that this was meant to be a transformative constitution was hardly lost upon the framers. Nehru often invoked the relationship between political democracy and economic democracy in his speeches and writings. In his view, without meaningful economic democracy, "all the adult suffrage in the world" would not spawn genuine democracy. During the debates, Nehru cautioned against the Constitution becoming "useless and purposeless":

> *At present the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn, we are confronted with this problem. If we cannot solve this problem soon, all our paper Constitution will become useless and purposeless*.[5]

Although an overwhelming majority (about 85%) of the electorate could not read or write at the time of the first elections to be held in India, it would be a mistake to equate this with political illiteracy (Gopal 1984: 279). At 60%, the voter turn-out was fairly high (Guha 2008: 153), especially in the context of the challenges of establishing the world's largest ever electoral system. The Election Commission filled the illiteracy gap admirably, through measures such as pictorial symbols and separate ballot boxes for each party (Morris Jones 1952: 238). While residents of villages and small towns may not have been aware of the trajectory of national policy, they were deeply affected by the *influence* of national policy on local interests. The denial of property rights to the zamindars was a matter of great symbolic centrality. Villagers would

[4] Constituent Assembly Debates, Volume XI, 25 November 1949 (B R Ambedkar).
[5] Constituent Assembly Debates, Volume II, 22 January 1947 (Jawaharlal Nehru).

likely know whether their local zamindar's interests had been affected by reform, or whether he was permitted to hold on to his property unabated.

To be sure, the Indian economy was in the doldrums for most of Nehru's tenure. For a country with remarkably high levels of poverty, the GDP growth rates remained less than modest. Nevertheless, what mattered for Nehru and his Congress colleagues was the direction, rather than the pace, of change. The nation was engaged in a "mighty adventure" involving the deconstruction of social hierarchies. Consider this extract from Nehru's letter to state chief ministers in March 1953 (Guha 2011: 310):

> *Probably the next five to ten years are the critical years for us. If we carry on during this period as a stable, progressive country, making good and advancing, then we have succeeded and we have little to fear in the future. Even if the pace is not quite so fast as we would like it to be, the mere fact of continuous progress on a stable basis would be a triumph for large scale democratic working.*

III. EARLY AMENDMENTS TO THE CONSTITUTION

Soon after the Constitution entered into force, Parliament began undertaking in non-judicial review in response to judgments of the Supreme Court and High Courts. In *Shaila Bala Devi v. Chief Secretary*,[6] the petitioner sought a judgment from the Patna High Court that a law[7] which penalized the publication of any documents which incited or encouraged the commission of murder or any cognizable offences involving violence, breached the freedom of speech and expression under article 19(1)(a) of the Constitution. The majority on the bench struck down the provision on the basis that it violated the freedom of speech and expression and did not fall under the permissible exceptions under article 19(2). At the time, the only exception was law relating to libel, slander, defamation, contempt of court or "any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State". Similarly, in another case,[8] the Supreme Court found a Madras state law (which authorised a ban on the

[6] AIR 1951 Pat 12.
[7] Indian Press (Emergency Powers) Act 1931, Section 4(1)(a).
[8] Romesh Thapar v. State of Madras, AIR 1950 SC 124.

circulation of documents to secure "public safety" and "public order")[9] overbroad as it violated the freedom of expression without falling within the scope of the exceptions laid down in article 19(2).

These decisions were made even before the first general election was held, leaving it to the Provisional Parliament to decide whether or not to respond immediately. By the First Amendment to the Constitution,[10] the exceptions provided for in article 19(2) were expanded so as to encompass clearly cases such as *Shaila Bala* and *Romesh Thapar*.[11] Parliament effectively nullified the two judgments and revived the statutes by altering the constitutionally permissible restrictions on the freedom of expression. In fact, when *Shaila Bala* was later appealed to the Supreme Court, the Patna High Court's judgment was reversed on the basis that the constitutional amendment had decisively concluded the matter.[12] The Provisional Parliament was thus able to replace courts' conception of the freedom of expression with its own.

The amendment was, of course, still a political calculation. Soon after the framing of the Constitution, Nehru and many others in the Congress Party conceived of the Hindu right, rather than the radical left, as posing the greatest challenge to the integrity of India. The Hindu Mahasabha was believed to be planning riots in Bengal, Bihar, the United Provinces, Rajasthan, and Hyderabad to stir up communitarian tensions (Gopal 1980: 156). In this vein, the amendment offered an opportunity to control these excesses by restricting the exercise of free speech.

The First Amendment was also a response to two other lines of judicial authority. First, the Patna High Court struck down land reform legislation that assessed compensation differently in the case of poor land owners and wealthy land owners, on the basis that it violated the rights to property and equality.[13] The Provisional Parliament responded by establishing the Ninth Schedule to the Constitution – an appendix of statutes that would be immune from findings of fundamental rights violations.

[9] Madras Maintenance of Public Order Act 1949, Section 9(1)(a).
[10] Constitution (First Amendment) Act 1951.
[11] The constitutional amendment also nullified four other judgments which struck down statutes for violating the freedom of speech and expression: Brij Bhushan v. State of Delhi, AIR 1950 SC 129; Amar Nath Bali v. State, AIR 1951 Punjab 18; Srinivasa v. State of Madras, AIR 1951 Madras 70 and Tara Singh v. State, AIR 1951 Punjab 27. See Burra 2008.
[12] State of Bihar v. Shaila Bala, AIR 1952 SC 329.
[13] Kameshwar Singh v. State of Bihar, AIR 1950 Pat 392.

In another case, the Supreme Court struck down an executive order establishing the community-wise distribution of seats in medical colleges, on the basis that it discriminated against upper caste candidates.[14] The Court read the Constitution's prohibition of discrimination in admission into educational institutions as foreclosing such measures. The First Amendment nullified the judgment by expressly permitting the state to make reservations in favor of socially and educationally backward classes of citizens.

The Fourth Amendment of the Constitution, enacted three years after the conclusion of the first general elections, once again responded to a Supreme Court judgment striking down land reform legislation. In *State of West Bengal v. Bella Banerjee*,[15] the constitutionality of a provision of state land reform law[16] was at issue before the Supreme Court. The statute was enacted primarily for the settlement of immigrants who had migrated into the province of West Bengal and provided for the acquisition and development of land. Landowners contended that section 8, which restricted the amount of compensation payable on acquisition so as not to exceed the market value of the land on a fixed date, violated the right to compensation under the fundamental right to property. The Court accepted the argument and struck down the statutory provision for failing to comply with the "letter and spirit" of the article.[17]

Parliament promptly nullified the Supreme Court's analysis through a constitutional amendment which excluded the inquiry into the adequacy of compensation paid for acquisition of land from judicial consideration.[18] A judgment of the Supreme Court was once again neutralized by amending the constitutional provision upon which it rested. Parliament disagreed with the Court's analysis of the implications of the right to property, and chose to replace it with its own.

IV. CAUSES OF & JUSTIFICATIONS FOR, NON-JUDICIAL REVIEW

During Nehru's tenure as Prime Minister, Parliament frequently amended the Constitution to dislodge judicial interpretations of fundamental rights. More than successive Parliaments' willingness to engage in non-judicial review, this paper is interested in why they did so. To start with, these amendments were often justified with reference to successive Parliaments' composition. This argument played out most clearly in

[14] State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.
[15] AIR 1954 SC 170.
[16] West Bengal Land Development and Planning Act, 1948.
[17] State of West Bengal v. Bella Banerjee AIR 1954 SC 170 [11].
[18] The Constitution (Fourth Amendment) Act 1955. Parliament also inserted the West Bengal Land Development and Planning Act 1948 into the Ninth Schedule of the Constitution, the significance of which will be discussed in the next part of this chapter.

the debates on the First Amendment to the Constitution. Since the general election was still to be held, the members of the Constituent Assembly were sitting as members of the Provisional Parliament. This virtual congruence of personnel between the body that drafted the Constitution and the Provisional Parliament was belabored by several MPs, especially Nehru.

To Nehru, it seemed implausible for the Supreme Court and High Courts to read constitutional text legalistically based on imputed intentions, when MPs at the time represented the "real intentions" of the framers of the Constitution.[19] An excerpt from his speech during the Lok Sabha debates offers evidence of this:[20]

> *…nearly all the members who are present here in this House were framers of this Constitution and they will remember the long debates we had about various matters. We spent many months over this. That does not mean, of course, that everything we did was perfect. No doubt we shall learn by experience and try to remedy. But the fact remains that we have a good, general broad idea of what we intended.* (emphasis supplied)

For Nehru, the Provisional Parliament not only had legal and constitutional authority to amend the text, but – having "shaped it and hammered it after years of close debate" - also had the moral authority to do so.[21] Other Congress Party members justified the amendment in the language of justice and equality. Kala Venkata Rao, a Congress leader from Andhra Pradesh, for instance, rhetorically asked: "who compensated the poor ryot [farmer] when feudalism became the law of the land and when free farming was replaced?" (Menon 2008: 200)

In an interesting exchange during the same debates, one MP questioned whether it was legitimate to amend the Constitution so soon after it had been drafted by the best brains in the country. Dr P S Deshmukh, who was later to become Union Minister in Nehru's government, swiftly retorted: "[t]he same brains are changing it".[22] Of course, as any student of constitutional law knows, attributing intention to the decision

[19] Lok Sabha Debates, Volume XII No II (1951), col 9083 (Jawaharlal Nehru).
[20] Lok Sabha Debates, Volume XII No II (1951), col 9074 (Jawaharlal Nehru).
[21] Nehru's argument may have been slightly disingenuous, given that other Congress and Non-Congress leaders played a more prominent role in the Constituent Assembly debates. Nevertheless, Nehru was understood to have played an important role in negotiations behind the scenes. He was a member of three important committees (states, union powers and union constitution).
[22] Lok Sabha Debates, Volume XII No II (1951), col 8939 (P S Deshmukh).

of a collective body is an exercise fraught with danger. This point was not overlooked. As one of Nehru's Congress colleagues observed, "you were not the only maker of the Constitution".[23]

The First Amendment was enacted "both too late and too soon" (Menon 2008: 192). On the one hand, the amendment demanded a re-examination of issues that the Provisional Parliament's previous avatar had considered only months ago. On the other, it was argued that the limited franchise based on which the Parliament was elected rendered it appropriate for any amendment process to await the general elections. Having otherwise expressed eagerness for general elections to be held as soon as possible, Nehru argued that these amendments could not be put on hold until the conclusion of the elections. This was because the amendments did not involve any *change* to the Constitution, but simply reiterated the intentions of the framers. In many ways, therefore, the First Amendment may be conceived of as an extension of the founding moment for Indian constitutionalism. Of course, this requires us to reconcile with a reality that may be unpalatable for many constitutional law scholars – that the Ninth Schedule (often branded as the bête noire of Indian constitutionalism), formed part of the original moment of constitutional creation.

After the general elections were held, parliamentary composition continued to offer justifications for the exercise of non-judicial review. The Congress Party dominated the early elections. The party secured 364 out of the 489 seats in Parliament in the general election of 1952, 371 of 499 seats in the general election of 1957, and 361 of 496 seats in the general election of 1962 (Kashyap 1992). Although several opposition parties from across different parts of the ideological spectrum were represented in Parliament, the Congress dominated proceedings. This ensured that the argument that the Members of Parliament were an extension of the framers continued to hold sway. During the debates on the Fourth Amendment, Nehru again explained that many Members of Parliament were personally involved in the process of framing the Constitution.

It is also significant that throughout Nehru's tenure, a large proportion of Lok Sabha members were trained lawyers. Lawyers comprised 35.6%, 30.3%, and 24% of the first three Lok Sabhas respectively (Kashyap 1992). The influence exerted by the lawyer-legislators was not just a function of numbers. Amongst the most prominent members of the freedom movement, and later the Lok Sabha, were lawyers.

[23] Lok Sabha Debates, Volume XII No II (1951), col 10040-41 (S L Sakshena). See also Lok Sabha Debates, Volume II (1955), col 2173 (Raghavachari) ('Do you expect any court to interpret the language, in which you have clothed the subject, or in the light of the intentions of the framers of the law, when the language is not capable of yielding those intentions?').

This included Nehru himself (trained at the Inner Temple), Dr P S Deshmukh (trained in Cambridge) and Pandit Thakur Das Bhargava (trained in University Law College). The influential role of lawyers played a part in successive Parliaments' ability to engage in serious interpretive disagreements with the courts.

Closely linked with the role of influential lawyers in India's early Parliaments was the fact that many of them were hardly engaging in conversations about the meaning, scope and limits of rights for the first time. Aside from the Constituent Assembly debates themselves, they participated in, or were close witnesses to, many discussions about civil, political and social rights in the years before independence. This was exemplified by the "Fundamental Rights Resolution" passed at the Congress Party's Karachi Session in 1931, described by one historian as "the main contribution of Indian nationalism" (Edwards 1971: 94) to the Constitution. This Resolution – a concession made by Gandhi for Nehru (Som 1994: 169) – included many rights that found their way into the Constitution, such as the freedom of speech, the right to equality and the right to form labor unions. In fact, conceived of more broadly, the history of the freedom movement – including the Swaraj Bill, the Commonwealth of India Bill, the Government of India Acts, the (Motilal) Nehru Committee Report and the Objectives Resolution - can be looked upon as a culmination of the process of writing the Constitution and its fundamental rights chapter (Nigam 2008: 127). Therefore, legislative decisions to amend the Constitution were not purely outcome-determinative. They were grounded in the general belief that members of parliament were equally (if not better) placed than the courts to interpret constitutional text.

Parliament's willingness to engage in non-judicial review was as much influenced by the Nehruvian conception of parliamentary authority as it was by Parliament's composition. By the time of independence (and in fact well before it), Indians were used to sitting on a range of legislatures based on British parliamentary traditions (Hewitt and Rai 2010: 30). For Nehru, Parliament was the central arena for political life where all decisions significantly affecting the people would have to be made.

British constitutional orthodoxy at the time dictated that parliament was the supreme decision-making authority. Of course, that did not imply that rights would remain unprotected. Instead, it was parliament, rather than the courts, that would protect those rights through debate and discussion on the floor of the house. Nehru was deeply conscious of the fact that even though the Congress Party was a loose coalition of diverse ideologies, the early Parliaments were dominated by Congressmen. He worked hard to

compensate for the absence of a strong opposition in the House: frequently consulting opposition leaders, urging them to supervise the executive, and encouraging free debate (Parekh 1991: 36).

In Nehru's world-view then, Parliament performed an explicitly normative role. It was a "moral institution" (Hewitt and Rai 2010: 34) that was the ultimate guardian of the people's rights and interests. His most common position in the debates for amending the Constitution was that Courts deciding legal questions concerning the validity of legislation were also indirectly making political, social or economic determinations. It was within the ultimate authority of "Parliament and Parliament alone" (Kashyap 1992: 20-21) to make these decisions. It is apt to cite Nehru's oft-quoted speech made to the Constituent Assembly on September 10, 1949 here:

> *Within limits no judge and no Supreme Court can make itself a Third Chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community.*[24]

Much like he did of Parliament, Nehru thought of constitutions themselves within a normative frame of reference. From a positivistic perspective, every legal system is governed by some kind of constitution by "conceptual necessity" (Gardner 2011). Nehru did not see things in this way. He was critical of nationalist leaders who described actions of the colonial power as "unconstitutional", and exhorted them to use the nomenclature of "legality" and "illegality" instead (Nehru 2004: 440). Constitutionalism, for him, could only mean democratic constitutionalism and nothing short. The role of a constitution was to govern the making of laws, to protect liberties, to regulate the executive, and provide for "democratic methods of bringing about changes in the political and economic structure" (Nehru 2004: 440). The Indian Constitution's task was to transform the ideals of "economic democracy" and "political democracy" that Nehru so often cited into reality.

V. CONSTITUTIONAL LEGITIMACY & THE NINTH SCHEDULE

The subject matter of the early amendments responding to decisions of the courts – land reform, affirmative action and public order legislation – were essential to maintaining the legitimacy of the

[24] Constituent Assembly Debates, Volume IX, 10 September 1949 (Jawaharlal Nehru).

constitutional project. Nehru had long been skeptical of a robust right to property, observing that he was "outrage[d]" by the decision to add vested rights in feudal estates to the list of fundamental rights at the All Parties Conference held in 1928 (Nehru 2004: 182-3). He lamented that the Congress and non-Congress top brass "preferred the company of landed magnates to that of the socially advanced groups in their own ranks" (Nehru 2004: 182-3).

Thus, for Nehru, "nothing" would be allowed to obstruct the "land problem" which presented the biggest challenge to constitutionalism in India (Kashyap 1994: 177). It would be imprudent to accept the existing state of affairs and expect "some great revolution" to transform social conditions . "Petty legal arguments" could not be permitted to obstruct access to social justice for millions (Kashyap 1994: 177). If the Constitution, as interpreted by the courts, hampered this social revolution, it was Parliament's prerogative to make clarificatory amendments to the Constitution. Time was equally of the essence – treading the path to economic justice could not remain a long-term ideal, but was a short-term necessity if the promises of the nationalist movement were to have any meaning. This explains why Parliament amended the Constitution in response to High Court judgments without awaiting the outcome of appeals to the Supreme Court (Gajendragadkar 1972: 104). The country had neither the time nor the patience to await changes through judicial interpretation.

Of public order legislation, Nehru said that a baseline of ordered liberty would need to be maintained in order for democracy to flourish. A disordered liberty would lead "ultimately to the suppression of that liberty" (Kashyap 1994: 172). Preserving democracy and liberty required stern discipline, without which the nation risked endangering "the very thing we stand for" (Kashyap 1994: 172). At one level, Nehru's argument - seeking to protect the very public order legislation that was frequently invoked by the British government to suppress the nationalist movement – seemed steeped in hypocrisy. This issue was often raised in the debates on the First Amendment.

Nehru's response was to rely on the need to preserve the legitimacy of a *democratic constitution*, as opposed to a colonial legal order. The nation was undergoing a dangerous state of transition, and the safety of the state demanded that it have the power to address "any serious situation that might arise" (Kashyap 1994: 175). Those who opposed the amendments committed the same error as the colonialists: assuming that Indians

were not fit to govern themselves, and that an external institution (in this instance, the courts) should be assigned that task (Burra 2010: 82).

At first glance, the design of the amendment inserting the Ninth Schedule into the Constitution undermines the narrative that the early Parliaments were, in the Westminster tradition, offering alternative constitutional interpretations to those of the courts. After all, all legislation – regardless of its source (federal or state) or subject matter - inserted into the Schedule would be insulated from judicial review. Once a legislation was inserted into the Schedule, it would remain protected from fundamental rights challenges indefinitely, until its removal through a subsequent amendment. The Schedule imposed no requirement of separate constitutional amendments for every law, enabling the government to insert legislation *en masse*, through a single constitutional amendment and one round of voting.

Viewed in its broader political context, however, the Ninth Schedule is a function of, rather than a derogation from, non-judicial review. At the time of its enactment, Nehru was firmly of the view that the Ninth Schedule should be invoked only in cases where it was necessary to protect land reform legislation from judicial scrutiny. While debating the amendment to the Constitution, Nehru observed that the bill was of "intrinsic and great importance" to the nation's progress (Singh 1995: 460). Striking a personal chord, he argued that although he was neither a landlord nor a tenant, his life had been "intimately connected" to agrarian agitations in his province (Singh 1995: 460). Albeit acknowledging that the Schedule produced a somewhat awkward design, Ambedkar himself recognized that it was necessary in order to safeguard an important category of legislation (Singh 1995: 461). During Nehru's tenure, Parliament's promise was largely upheld. Only two of the sixty-four statutes inserted into the Ninth Schedule lacked a clear connection with land reform.

Although the Ninth Schedule was directed towards land reform legislation, its ambit was left broad enough to encompass legislation addressing any subject. Given the high proportion of lawyers in the Provisional Parliament, it is likely that many of them would have understood the import of the provision. Why was the scope of the Ninth Schedule not restricted to land reform? The likely explanation, as one scholar suggests, is that it was allowed to remain broadly framed by virtue of "sheer neglect" (Noorani 2007: 731). The debates on the First Amendment indicate that the scope of the Schedule was hardly a matter of political contestation. Instead, the MPs that opposed the amendment did so on the basis that it would have been preferable to await final judgment from the Supreme Court before making the amendment. Principled

opposition on grounds of scope was virtually non-existent, and most of the members are likely to have assumed that the Ninth Schedule was no more than a land reform amendment diluting the individual right to property.

VI. CONSTITUENT ASSEMBLY DEBATES ON THE AMENDMENT FORMULA

There is an interesting link between non-judicial review during Nehru's tenure as Prime Minister and the Constituent Assembly debates on the provisions for amendment of the Constitution. As Granville Austin records, the amendment formula that was eventually selected for article 368 (a two-thirds majority of both Houses of Parliament) was the product of compromise between two opposing views (Austin 1966: 257). On the one side, there were those who were in favour of a rigid amending formula much like that embodied in article V of the US Constitution. This included Dr B R Ambedkar, who, in a speech echoing that of Chief Justice Marshall,[25] observed that the constitution was a "fundamental document" that defined the powers of the three branches of state.[26] It mattered not that the Assembly was elected on a limited franchise, since it commanded the intellectual resources to draft the constitution. He "utterly repudiate[d]" the argument that a body elected based on universal franchise would possess greater knowledge and wisdom than the Constituent Assembly.[27]

Several other members, however, were in favor of permitting amendment by simple majority, at least for a defined timespan. Prominent amongst them were Nehru, H V Kamath and B N Rau. Nehru proposed an amendment during the debates that would have permitted Parliament to amend the Constitution for the first five years of its functioning. The reasons offered in support of the five-year easy amendment rule were manifold. To start with, the Constituent Assembly was elected on a limited mandate, and it would be desirable to vest considerable authority in the first legislature elected on a full mandate. It was also said that the Drafting Committee and the Assembly faced heavy work pressures and time constraints. This restricted the ability to consider all of the provisions of the constitution and their implications threadbare.[28]

[25] McCulloch v. Maryland, 17 U.S. 316 (1819).
[26] Constituent Assembly Debates, Volume IX, 17 September 1949 (B R Ambedkar).
[27] Constituent Assembly Debates, Volume IX, 17 September 1949 (B R Ambedkar).
[28] Constituent Assembly Debates, Volume IX, 17 September 1949 (Acharya Jugal Kishore).

Those members who were influenced by British constitutional scholarship adopted Dicey's position that an inflexible constitution would fail to withstand the test of time (Reddy 2001: 255). Others observed that the Assembly members' vision was colored by the events leading up to (and following) the partition, hindering dispassionate thinking.[29] Non-Congress members ironically supported Nehru's position and gave the argument a different spin, contending that the Congress Party enjoyed disproportionate representation in the Assembly.[30]

Which side won in this fascinating, but brief, battle over the amendment clause? Much would depend on what we consider each side's default position to be. If the positions taken at the Assembly are treated as the defaults, the Ambedkar camp clearly won, having managed to retain a two-thirds majority requirement for constitutional amendments in the face of opposition. However, if we were to extend the clock back to the drafting committee stage, the final provision looked like much more of an equitable settlement between Nehru and Ambedkar's approaches to constitutional change. In fact, inferences have been drawn from Nehru's absence at the committee's first discussion on amendments and his presence at the second, as constituting a decisive factor behind abandonment of the idea of an article V-type amendment clause (Austin 1966: 259).

From Nehru's perspective, a semi-permanent constitution for the first five years would ensure that Parliament would be in a position to anticipate, and quickly address, shortcomings in the way that the constitution was functioning.[31] This argument turned out to be prophetic, except for the fact that the Congress-dominated Parliaments were nevertheless able to secure the two-thirds majority that the Constitution eventually required in order to address early concerns. This proposed amendment tied in with Nehru's more general ideas about constitutional flexibility. For Nehru, constitutions could not be changed wantonly, but should be changed when the situation required it. This involved a recognition of the fallibility of the framers: "Nothing is perfect, and then it becomes necessary to make changes to remove those flaws [in the Constitution]" (Kashyap 1992: 20).

[29] Constituent Assembly Debates, Volume IX, 17 September 1949 (Brajeshwar Prasad). Prasad would have gone further than Nehru, in that he was in favor of an easy amendment rule for ten years.
[30] Constituent Assembly Debates, Volume IX, 17 September 1949 (Mahavir Tyagi).
[31] Constituent Assembly Debates, Volume IX, 17 September 1949 (H V Kamath).

CONCLUSION

Parliament's keenness to engage in non-judicial review during Nehru's tenure was driven by intrinsic and instrumental factors. Intrinsically, Nehru and many of his Congress colleagues believed that Parliament's composition and authority rendered it more competent than the courts to interpret rights and test the validity of legislation. Instrumentally, Nehru and his colleagues were deeply conscious of the fact that the legitimacy of the Constitution was tied to the promises it made to the masses. For many of the framers and early MPs, it was "better to change the Constitution than to risk the whole constitution being rejected" (Gajendragadkar 1972: 1953).

Treading the path to social justice was a necessity if democracy was to survive, and "drastic and radical" (Gajendragadkar 1972: 1953) extra-constitutional options were to be avoided. The more the constitution, as interpreted by the courts, was conceived of as sacrosanct, the more likely that those in power would "try to break it". Even some of Nehru's ardent critics agree that the early amendments "created widespread acceptance of the Constitution" (Rajagopalan 2014). Non-judicial review is not to be forgotten in considering why Sir Ivor Jennings' bleak diagnosis of the Constitution (Jennings 1953) turned out to be unreliable; and why the Constitution has endured much beyond the average lifespan of nineteen years (Elkins, Ginsburg and Melton 2009).

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